NO. 80-120

In the Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THERE IS NO EVIDENCE OF CONGRESSIONAL INTENT TO INCLUDE CHURCH ELEMENTARY AND SECONDARY SCHOOLS WITHIN THE PROVISIONS OF FUTA.

Both the State of South Dakota and the United States as amicus curiae desperately look for support in legislative history where no support exists, seeking to show that Congress must have intended to extend unemployment compensation law to churches that operate elementary

and secondary schools. However, their complicated interpretation of legislative history offers no support for their contentions.[1]

The purpose of the Unemployment Compensation Amendments of 1976 (Pub.L.No. 944-566) was to extend the unemployment compensation law primarily to three categories of employees: state and local government employees, agricultural workers and domestic workers. Nowhere in the legislative history or debates are churches or their schools mentioned. *See* H. Rep. No. 94-755, 94th Cong., 1st Sess. 3, 16 (1975).

The amicus curiae brief by the United States quotes isolated statements made by Rep. Corman and Rep. Ullman that appear in the Congressional Record. *See* 122 Cong. Rec. 22518-22519, 22892-22900 (1976). Rep. Ullman was speaking about expanding coverage to state and local workers, such as a cafeteria worker for a "city, county, or local school board." (Id., at 22519) Rep. Corman was also speaking about extending coverage to farm workers, domestic workers, and state and local employees. In fact, the statements attributed to Rep. Corman (Id., at 22819) were made *in opposition to an amendment to exclude those workers from coverage* under the proposed 1976 amendments. Rep. Corman gave specific examples — all of which pertained to governmental workers.

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[1] Legislative intent should not be an issue. Basic principles of statutory construction dictate that when the words of a statute are clear the plain language of the statute controls. Contrary to this well defined principle the South Dakota Supreme Court fails to determine the applicability of section 3309(b)(1)(A), stating that the threshold question before it involved congressional intent with respect to repeal of section 3309(b)(3). *See* Pet. Br. at 11; Amici Curiae Br. by Alabama and Nevada, at 7.

References are made to an isolated figure found in S. Rep. No. 94-1265, 94th Cong. 2d Sess. (1976) at 8. The Administrative Law Judge in the proceedings before the Department of Labor in *Alabama v. Marshall,* 626 F.2d 366 (5th Cir. 1980), (J.A. 18 at 31) rejected the Secretary of Labor's reliance on this figure, after hearing testimony on the development of this number stating:

> [T]he Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data, and admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.

Legislative history leaves no doubt that Congress intended the employeees of churches that maintained schools to be exempt from unemployment compensation law. When Congress required the states to extend FUTA to non-profit organizations (Unemployment Security Amendments Act of 1970, Pub.L.No. 91-373, 84 Stat. 695), it established six separate exemptions. (26 U.S.C. § 3309(b) [1970]) The first of these, Sec. 3309 (b)(1), dealt with services *in the employ* of individual churches and their related organizations. Both the House and the Senate (in identical language) explained what was meant by its church and church organization language. H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969), and S.Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970). Both reports say:

> This paragraph excludes services of persons where *the employer* is a church or convention or association

> of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). [Emphasis added]

Congress was careful to use the *identical* language it had used in other parts of the Internal Revenue Code. (*See* Amicus Curiae Br. of the Lutheran Church-Missouri Synod at 4-9) Congress then explained its statutory language (H.R.Rep., *supra* and S.Rep., *supra*):

> Thus, the services of the janitor of a church would be excluded, but the services of a janitor for a *separately incorporated* college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would be a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (*separately incorporated*) charitable organization (such as, for example, an orphanage or home for the aged) would not be considered to be operated primarily for religious purposes. [Emphasis added][2]

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[2] The State of South Dakota seeks to link church elementary and secondary schools with statements made by Congress relating to *separately* incorporated colleges (Resp. Br. at 15-16). The same error was made by the South Dakota Supreme Court (*See* Opinion, J.A. at 6-7). Both South Dakota and its Supreme Court fail to apply decisions by this court recognizing that the advancement of religion is not a substantial purpose of most church-affiliated colleges but is the primary purpose of church and secondary schools. *See* Tilton v. Richardson, 403 U.S. 672, 687 (1971); Roemer v. Board of Public Works, 426 U.S. 736, 755-58 (1976); Meek v. Pittenger, 421 U.S. 349, 366 (1975); *see also* Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872, 891 (D. Kan. 1974). Likewise, reliance on the general statement by the House Ways and Means Committee that it was concerned about the needs of employees of non-profit religious, charitable

It is submitted that Sec. 3309(b)(1) entirely contains whatever exemptions from FUTA are available to churches and their other separately incorporated organizations and that the 1976 elimination of the elementary and secondary school exemption that was contained in Sec. 3309(b)(3) of FUTA had no effect whatever on churches or their related organizations. (*See* Amicus Curiae Br. of United States Catholic Conference at 4-10)

Reference to the temporary Special Unemployment Assistance ("SUA") program established in 1974 (Pub.L. No. 93-567, 88 Stat. 1845) and its replacement by the 1976 FUTA amendments does not support any argument of Congressional intent. The SUA program was designed to provide additional assistance to those whose eligibility for unemployment compensation expired and all of those who were not previously covered under unemployment compensation law.[3] When Congress passed the 1976 amendments to FUTA, it left intact many of its exemptions under Sec. 3309(b). Obviously, Congress never intended universal coverage, and it simply cannot be argued now that the replacement of the all-inclusive SUA program by the limited 1976 FUTA amendments demonstrates an intent by Congress to subject employees of churches who operate schools to unemployment compensation law.

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and humane organizations is misplaced. (*See* Opinion, J.A. 6 and Pet. Br. at 14-15 (quoting H.R. Rep. No. 612, 91st Cong., 1st Sess. [1969]) The Committee's statement is of no assistance in interpreting exemptions actually enacted for certain types of non-profit employers, including religious organizations.

[3] *See* Sec. 202(b), 88 Stat. 1845, P.L. 93-567.

II. RESPONDENT SOUTH DAKOTA AND THE UNITED STATES AS AMICUS CURIAE DISREGARD THE PLAIN LANGUAGE OF SECTION 3309(b)(1)(A) OF FUTA.

The petitioner suggests that the starting point should be the language of the statute and not a wild excursion into possible Congressional intent (*See* Pet. Br. at 11; Amicus Curiae Br. of State of California at 8-11). Yet, South Dakota does not discuss Section 3309(b)(1)(A), which clearly exempts *all* employment by churches.[4] The United States, to support its discussion of Section 3309(b)(1)(A), seriously errs in stating as a fact that it is commonly perceived that church elementary and secondary schools are generally separately organized and recognized as separate legal entities. Exactly the opposite is the case as the United States well knows.

In *Alabama v. Marshall,* 626 F.2d 366, 370 (5th Cir. 1980), *pet. for cert. filed,* No. 80-922 (U.S. Dec. 8, 1980), holding services performed in church elementary and secondary schools are exempt services "in the employ of the church" under Section 3309(b)(1)(A) of FUTA, it was recognized that "many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined, and fired

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[4] The State of South Dakota asserts that exemptions from remedial statutes must be narrowly construed, *"giving due regard to the plain meaning of statutory language and the intent of Congress,"* (Resp. Br. at 13) yet completely disregards the evident meaning of Sec. 3309(b)(1)(A) exempting in the employ of a church. *See* Caminetti v. United States, 242 U.S. 470, 485-86 (1917); 3 C. Sands, *Sutherland Statutory Construction,* § 60.01 (4th ed. 1974). In addition, even a "remedial" statute cannot be construed to apply to church schools in the absence of "the affirmative intention of Congress clearly expressed." NLRB v. Catholic Bishop, 440 U.S. 490, 500-01 (1979).

by church representatives and officials; school buildings are owned by the church; and, school employees are paid with funds drawn from the church accounts." This description by the court was based on stipulated facts agreed to by the United States (through the Department of Labor) regarding not only Lutheran elementary and secondary schools, but Baptist and Catholic as well. *See* Br. by the State of Alabama and Nevada as Amici Curiae at 8-9 and n. 15 and 16; ***and,*** Alabama Exhibit A at ¶¶ 21, 23-26, 38-41, 57, 65, 68-69 (Joint Appendix filed in ***Alabama v. Marshall, supra,*** lodged with this court in No. 80-922 [hereinafter "Ala./Nev. J.A."] at 51-53, 55-56, 60, 63-65; Nevada Exhibit A at ¶¶ 2-9, 27-29, 33-35 (Ala./Nev. J.A. at 93-95, 98-99)).

In addition, the Department of Labor directly stipulated in those proceedings that it did not dispute the Nevada Employment Security Department's factual determination that services in certain Catholic elementary and secondary schools were exempt from coverage under 26 U.S.C. § 3309(b)(1) "because they are performed in the employ of a church . . ." (Ala./Nev. J.A. at 109-110). As in the stipulated facts agreed to by the United States in ***Alabama v. Marshall, supra,*** the elementary school operated by St. Martin Evangelical Lutheran Church is not a separate legal entity, receives all of its financing from the church and is supervised by members of the church. (Pet. App. A38, ¶ XII). Likewise, Northwestern Lutheran Academy is not a separate legal entity from the Wisconsin Synod, and its support, operation and policy comes directly from the Synod. (Pet. App. A39, ¶ XV).

Notwithstanding, now the United States attempts to show that the word "church" should be used in a limited sense to be synonymous with an individual house of worship attempting to show that the exemption under Sec.

3309(b)(1)(A) is dependent upon the nature of the services performed and not who the employer is. As the Department of Labor's own Administrative Law Judge found in the *Alabama v. Marshall, supra,* conformity hearings (J.A. 31), "a construction of the language 'in the employ of a church' which looks to religious function and place of worship, rather than identification of the employing organization, plainly ignores the language employed by Congress not only in the statute itself, but also in its legislative history. . . ." Agreeing with the Administrative Law Judge, the Fifth Circuit said:

> We are convinced that the plain meaning of 'church' requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly refered to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary. (*Alabama v. Marshall, supra,* at 371)

In its brief the United States suggests that if the word "church" were defined to mean other than "an individual house of worship" employees of certain church schools would be exempt from FUTA while others would not be exempt depending solely upon whether they were separately incorporated. This completely overlooks the criterion Congress used in distinguishing services performed in the employ of a church under Section 3309(b)(1)(A) from services performed in the employ of a "separately incorporated" church related organization under Section

3309(b)(1)(B). (*See,* S.Rep. No. 91-752, *supra,* at 49; H.Rep. No. 91-612, *supra,* at 44).[5]

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[5] The brief by the United States contends that an interpretation of Section 3309(b)(1)(A) based on the legal identity of the employing organization would be wrong because under such an interpretation employees engaged in a profit-making business operated by a church would be exempt from coverage under FUTA although its business income would be taxable under 26 U.S.C. § 511. It should be noted that it would be extremely rare for churches to operate a "profit-making business" under the same corporate entity as the church because to do so would risk loss of its tax exempt status under 26 U.S.C. § 501(c)(3). However, even if the possibility contemplated by the United States would exist, it would not justify ignoring the plain language and legislative history of the statute. Basing the exemption on the legal identity of the employing orgainzation rather than the nature of the services is an easy test to apply and diminishes the risk of excessive entanglement with religion. *See* Walz v. Tax Commissioner, 397 U.S. 664, 698 (1970), which states that the more discriminating and complicated the basis of classification for an exemption the greater the risk of unconstitutional entanglement. (Harlan, J. concurring) Mistakenly relying on DeLaSalle Institute v. United States, 195 F. Supp. 891 (N.D. Cal. 1961) for support that "church" exemptions often are given a narrow meaning (U.S. Brief at 16), the United States fails to realize that the court held that the institute, which had a *separate corporate existence* from the church and operated a winery and schools was not a church for the purpose of exemption from the unrelated business income tax. *Id.,* at 893, 901. The court clearly did not rule that a church school with no separate legal identity from the church could not be considered part of the church. Indeed, in stating "[p]laintiff enjoys the advantages of separate incorporation under the civil law, and it must bear the disadvantages," the court suggested that had the institute not been separately incorporated the case might have had a different result. 195 F.Supp. at 901.

III. SERVICES PERFORMED IN CHURCH ELEMENTARY AND SECONDARY SCHOOLS ARE EXEMPT BECAUSE THEY ALSO ARE SERVICES IN THE EMPLOY OF AN ORGANIZATION OPERATED PRIMARILY FOR RELIGIOUS PURPOSES.

The United States makes the astonishingly bizarre statement that the existence of religious purposes in elementary and secondary schools was not intended by Congress to be grounds for exemption from FUTA but that colleges devoted to preparing students for the ministry would be covered by the exemption under Section 3309 (b) (1) (B). (U.S. Br. at 18-19) There simply is no support for any claim that legislative history shows that the only educational institutions that may be recognized as primarily religious under the provisions of Sec. 3309(b) (1) (B) are college seminaries, novitiates and "Sunday schools." (*See* Pet. Br. at 16-21 and 26-28; Amici Curiae Br. by Alabama and Nevada at 12-13 and 16-18; Amici Curiae Br. by Association of Christian Schools International, et al., at 4-7; Amici Curiae Br. of Germantown Friends School, et al., at 28-31).[6]

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[6] Church related organizations, such as orphanages or homes for the aged, obviously differ from church elementary and secondary schools. Orphanages and homes for the aged are established in furtherance of a religiously motivated purpose and are devoted primarily to physical care and maintenance, while church schools have as their primary purpose the inculcation of religious doctrine and belief into the overall school curriculum. (*See* Pet. App. A40, ¶ XIX) Walz v. Tax Commissioner, supra, at 671, recognized that schools are devoted "to assur[ing] future adherents to a particular faith by having control of their total education at an early age." It is interesting to note on facts similar to those in the record of this case that the United States expressly stipulated to the pervasive religious nature of church schools and to the factual

The effort by the United States to distinguish Supreme Court decisions acknowledging the pervasively religious nature and purpose of church schools is similarly futile. (*See* U.S. Br. at 17, n. 14) The cases in question involved church schools virtually identical to those in the instant case, and the Supreme Court's conclusions concerning those schools are applicable here. Moreover, almost all of the cases dealt with the same constitutional issue of entanglement raised in this case. *See* e.g., *NLRB v. Catholic Bishop,* 440 U.S. 490, 501-03 (1979); *Lemon v. Kurtzman,* 403 U.S. 602, 615-18 (1971).

We submit that both the brief by the Respondent and the brief by the United States misconstrue Sec. 3309(b)(1)(B) of FUTA, misinterpret legislative history and ignore facts and findings in the record showing the primary religious purpose of church elementary and secondary schools.

IV. THERE IS NO "AFFIRMATIVE INTENTION OF THE CONGRESS CLEARLY EXPRESSED" TO INCLUDE CHURCH ELEMENTARY AND SECONDARY SCHOOLS WITHIN UNEMPLOYMENT COMPENSATION LAW.

The State of South Dakota completely ignores and the United States all but ignores the obvious applicability of *NLRB v. Catholic Bishop, supra.*

The statement by the United States that *"Catholic Bishop* has no application to the present case" (*See* U.S.

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determination by the Nevada Employment Security Department that church schools are operated primarily for religious purposes but now takes a different position as amicus curiae before this court. (*See* Amici Curiae Br. by Alabama and Nevada at 12-13 *and* n. 21).

Br. at 22) is particularly implausible in view of the Solicitor of Labor's comment, while the *Catholic Bishop* case was pending before the Supreme Court, that:

> The Supreme Court in that case will hopefully provide guidance as to how far the government can legitimately extend its socio-economic goals into a church-related school. Conversely, it may indicate how narrow is the area of church activity that is protected by the First Amendment. These considerations should eventually help us in how best to construe section 3309(b)(1).[7]

There will be a great deal more than "minimal" involvement by the state in determining what part of a teacher's duties are "religious" and what part are "secular." This is apparent when applying the directive by the Department of Labor to state employment agencies that the only services performed in church-related elementary and secondary schools within the permitted exclusions of section 3309(b)(1) "are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities." (U.S. Department of Labor Unemployment Insurance Program Letter No. 39-78 [J.A. 40]) The manifest potential for excessive entanglement by the states in making determinations of who is subject to the unemployment compensation tax and who is not was recognized in a similar case to that before this court by the U.S. District Court in *Grace Brethren Church v. California,* No. CV79-93, MRP (C.D. Cal., Sept. 21, 1979) *appeal docketed,* No. 79-3763 (9th Cir.,

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[7] Memorandum for the Secretary from Carin Ann Clauss (Mar. 29, 1978 [J.A. 45]).

Nov. 27, 1979); Slip opinion at 10, Ala./Nev. J.A. 181, at 190.[8]

In addition, the fragments of legislative history relied upon by the United States in its brief fall far short of the unmistakable evidence of legislative intent mandated by the Supreme Court. There simply is not one reference to church schools in any of the relevant reports and debates of the 1976 amendments to support any contention of intent, much less an "affirmative intention of the Congress clearly expressed." *NLRB v. Catholic Bishop, supra.*[9] Consequently, the decision by the South Dakota Supreme Court cannot be sustained.

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[8] At Ala./Nev. J.A. 192-193, the court in Grace Brethren, *Id,* referred to intrusive inquiries by the state into the religious content of a teacher's activities, questionnaires requiring identification of "licensed, ordained or commissioned minister(s) among . . . employees," services performed by teachers, and where performed. In a footnote, the court said: "One declaration details the visit of an auditor to a pre-school. The auditor, after asking detailed questions as to what transpired in the music class, the "nature center" and the "block center" ended by classifying music as strictly religious and the nature and block centers as both religious and secular. There is even a list of exempt employees which was given to one of the church schools at the conclusion of an audit. *See* Slip opinion, *ibid.* 20 footnote 11, Ala./Nev. J.A. 200; *see also* Amicus Curiae Brief of Christian Schools International, Appendix A, p. A2-6.

[9] *See* Pet. Br. at 21-22; Amici Curiae Br. by Alabama and Nevada at 18-19. The Secretary's statements in 1970 that "church" is to be defined in its limited sense as an individual "house of worship" (U.S. Br. at 19) are taken out of context. The *1970 Draft Legislation* referred to, if read in its entirety, parrot what Congress said in its reports on the 1970 amendments. *Compare, The Draft Legislation to Implement the Employment Security Amendments of 1970* at 27, summarized at 1B Unempl. Ins. Rep. (CCH) § 1356, at p. 4349 (1977) and identical statements in H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969)

V. THE SOUTH DAKOTA SUPREME COURT ERRED IN ACCORDING ANY DEFERENCE TO THE SECRETARY OF LABOR'S INTERPRETATION OF SECTION 3309(b)(1).

The Secretary of Labor's latest interpretation of the exclusions from FUTA are not entitled to any deference from the court because they represent a *reversal* of its *contemporaneous* interpretation of the statute. *See* Amici Curiae Br. of Alabama and Nevada at 18-19.

The first memorandum by the Department of Labor, issued in 1976 (J.A. 34-36), if read in its entirety, and the Department's February, 1977, memorandum (J.A. 36-39) conflict with the Unemployment Compensation Insurance Program Letter No. 39-78 issued on May 30, 1978. (J.A. 40-44)[10]

However, the most fundamental obstacle to according any deference to the Secretary of Labor's 1978 interpretation is that it contradicts the plain language of Sec. 3309 (b)(1) and lacks any support for pertinent legislative history. *See, General Electric Co. v. Gilbert,* 429 U.S. 125, 140-145 (1976); *Morton v. Ruiz,* 415 U.S. 199, 237 (1972); *Social Security Board v. Nierotko,* 327 U.S. 358, 369-370 (1945).

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and S.Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970). The Solicitor of Labor, however, discussing Sec. 3309(b)(1), admits that "if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the legislative history is silent." (Memorandum for the Secretary from Carin Ann Clauss, Mar. 29, 1978, J.A. at 52)

[10] *See* Amicus Curiae Br. of California at 4-7, for a discussion of the various memorandum issued by the Department of Labor.

For the foregoing reasons, the South Dakota Supreme Court erred in ruling that the Secretary's interpretation is entitled to "great deference."

VI. SUBJECTING CHURCH ELEMENTARY AND SECONDARY SCHOOLS TO UNEMPLOYMENT COMPENSATION LAW VIOLATES BOTH THE ESTABLISHMENT AND FREE EXERCISE CLAUSES.

The State of South Dakota and the United States attempt to divert attention from Petitioners' and the various amici curiae's constitutional arguments by discussing a series of cases unrelated to the excessive entanglement issue before this court. *See* Resp. Br. at 31-42; U.S. Br. at 23-28.[11]

The Petitioners do not dispute cases which hold government regulations that promote public welfare or safety *and involve no excessive government entanglement with religion* may be applied to churches and their schools. Nor is there any question concerning laws prohibiting practices in violation of social good order. *Reynolds v. United States,* 98 U.S. 145, 164 (1879).[12] Moreover, the Petitioners have never argued that the extension of FUTA to churches that operate elementary

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[11] Resp. Br. at 31 makes the statement that "Petitioners in this case wish to raise the entanglement issue and at the same time, not claim establishment of religion by letting them avoid a tax . . ." overlooking that Walz v. Commissioner, 397 U.S. 664, 672-675 (1970) recognized that the granting of a tax exemption is not the sponsorship or inhibition of religion and that the elimination of an exemption would tend to expand government involvement with religion.

[12] *See, e.g.,* Braunfield v. Brown, 366 U.S. 559 (1961) (state law barring retail sales on Sunday); Jacobson v. Massachusetts, 197, U.S.

and secondary schools is invalid because it "operates so as to make the practice of . . . religious beliefs more expensive." Resp. Br. at 22; U.S. Br. at 29.

The basic issue before this court is the intolerable degree of entanglement resulting from the arbitrary extension of unemployment compensation laws to those churches that operate elementary and secondary schools. (*See* Pet. Br. at 30-38) The State of South Dakota fails to rebut this argument.[13]

Any claim that classification of services performed in church schools into "secular" and "religious" is not required and that the only determination needed is simply whether a person "is employed by the school or by the church" merely begs the question. (Resp. Br. 40-41; U.S

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11 (1905) (upholding compulsory vaccinations); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding conviction of Jehovah' Witness for violation of child labor laws); *see also,* Lemon v. Kurtzman, 403 U.S. 602 (1971), noting that "[f]ire inspections, building and zoning regulations and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts."

[13] Petitioners' argument is based on entanglement when a determination has to be made as to what services at the church school are "strictly church duties" and when a determination has to be made on eligibility for benefits when a termination of employment occurs. The Respondent claims that "potential entanglements cannot be used to negate any possible unemployment insurance coverage of church school employees. . ." (Resp. Brief at 39) Respondent misstates the law. The "entanglement" cases are almost entirely concerned with the *potential* for entanglement. In Lemon v. Kurtzman, 403 U.S. 602, 619-620 (1970) the court warned about the "hazards" and "dangers" posed by the statute under question that was "*apt* to entangle" creating a relationship "pregnant" with involvement. Walz v. Tax Commissioner, 397 U.S. 664 (1970), warned against government involvement with religion that could *lead* to "confrontation and conflicts" between government and churches. *Id,* at 674.

Br. at 26) The April 16, 1978, letter from the Secretary of Labor to Bishop Kelly specifically states that "services performed in the schools that may . . . be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the school. Pet. App. at A4; Ala./Nev. J.A. at 37. The Department of Labor Unemployment Insurance Program Letter No. 39-78 dated May 30, 1978, uses identical language (J.A. at 41) as does the October 31, 1979, decision by the Secretary of Labor at 6a. (Ala./Nev. J.A. at 17)[14] That difficult determinations would have to be made, for example, as to whether in a world history class the teacher spends more than one-half of any given session to teaching purely "religious" or purely "secular" can hardly be subject to doubt.[15]

Excessive entanglement also can occur where hearings are made on unemployment compensation claims of former church-school employees. Pet. Br. at 34-37. Both the Respondent and the United States seem to admit that there might be some inquiry into church doctrine and practice in the event of a hearing on an unemployment compensation claim but that this inquiry would not constitute a First Amendment violation. (Resp. Br. at 38-39;

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[14] The Petitioners assert that the classification required cannot be made without "pervasive monitoring of . . . church agencies by the secular authorities" and continuing evaluation by government "about what does and does not have religious meaning" because everything that is taught is inculcated with religious doctrine. *See* Lemon v. Kurtzman, supra, 403 U.S. at 627; New York v. Cathedral Academy, 434 U.S. 125, 133 (1977); Pet. Br. at 32-38.

[15] See pp. 12-13 and n. 8, *infra,* for examples of how extensively these determinations were made by a state agency pursuant to the directives received by the Department of Labor.

U.S. Br. at 26-28) The testimony of a Department of Labor expert in the Alabama-Nevada conformity hearings before the Department of Labor reveals that evidence at such a hearing would consist of testimony from the employee and church authorities what they understood the doctrine of the church to be; the state hearing officer would be required to appraise the credibility of the employee and the church authorities; and, the hearing officer would have to determine whether the teacher knowingly violated church doctrine.[16]

The Respondent suggests that doctrinal matters are controlled by the church and that the state only need determine if the employee were fired or laid off to determine eligibility for unemployment compensation benefits (Resp. Br. at 37) referring to the decision by the South Dakota Supreme Court (Pet. App. at A14). The United States erroneously amplifies this by stating "[p]etitioners are free to establish whatever work rules they choose . . . Whether or not these rules correctly correspond to church doctrine is irrelevant; violation of the rules constitutes misconduct." U.S. Br. at 28. Those statements misstate the law. Violation of employer work rules does not constitute misconduct under unemployment compensation statutes unless the work rule is reasonable. *See generally,* 76 Am.Jur.2d, Unemployment Compensation § 53. An inquiry into the reasonableness of a work rule based on church doctrine "touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Academy,* 434 U.S. 125 at 133 (1977).

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[16] *See* Amici Curiae Brief by Alabama and Nevada at 26; Transcript of Administrative Hearing in Alabama v. Marshall, supra, dated Sept. 26, 1979, at 108-110, 113-114, 119-120 (Ala./Nev. J.A. 151-153, 156-157, 162-163).

The Respondent states that to raise the entanglement issue there must be some showing that some religion has been established. Resp. Br. at 31. The United States, erroneously agreeing with the Respondent (U.S. Br. at 23), then goes further and suggests that the entanglement cases do not apply because Petitioners have not shown "how the basic prohibition . . . against aid to religion is involved. . ." (U.S. Br. at 24) Both the Respondent and the United States misinterpret the law. The primary effect of the excessive government entanglement is the potential to inhibit or advance religion. *See* Pet. Br. at 37-38. The United States misreads the "school aid" cases it refers to in its brief. (U.S. Br. at 34) The issue in those cases was not "aid" but the entanglement involved by government surveillance to assure that financial aid for legitimate secular purposes would not be diverted to "advance" religion. Those cases were decided on the basis of "entanglement" and not "school aid." Referring to the three-part test for determining whether a challenged statute violates the Establishment Clause, the Supreme Court clearly said that: "If a statute violates any of these three principles, it must be struck down under the Establishment Clause." *Stone v. Graham,* .... U.S. ...., 66 L.Ed.2d 199 (No. 80-320, decided Nov. 17, 1980).

The Petitioners have never disputed the socio-economic importance of unemployment compensation law. What is submitted, however, is that the Respondent has not demonstrated that it is a state interest of sufficient magnitude to override the Free Exercise rights guaranteed under the Constitution. *See, Wisconsin v. Yoder,* 406 U.S. 205 at 214 (1972).[17] Further, there is no showing whatever that there is no other way to reach the socio-

[17] The Respondent erroneously states that St. Martin Lutheran Church "closed its doors" in 1979. (Resp. Br. at 29) Northwestern Lutheran Academy did not continue classes for the 1980 and 1981

economic goals of FUTA without violating the legitimate Free Exercise claims of the Petitioners. *See, Barnett v. Rodgers,* 410 F.2d 995, 1000 (D.C. Cir. 1969); *Wisconsin v. Yoder, supra,* at 215; *see also discussion in* Amicus Curiae Br. of Americans United for Separation of Church and State, at 11-13.

The Respondent has failed to rebut the Petitioners' argument that extension of unemployment compensation law to services in church schools will cause excessive and enduring governmental entanglement with religion in violation of both of the Religion Clauses. Therefore, if this Court determines that Sec. 3309(b)(1) does not apply to the Petitioners, the decision by the South Dakota Supreme Court must nevertheless be set aside and reversed.

CONCLUSION

For the reasons stated herein, and those set forth in their main Brief, the Petitioners request this court to reverse and set aside the Decision by the South Dakota Supreme Court.

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school year but continues its full maintenance staff. Unless the decision by the South Dakota Supreme Court is reversed, Northwestern Lutheran Academy is liable for past and present unemployment compensation tax liability.